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Washington, DC 20529

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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 30 2005

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

ON BEHALF OF PETITIONER:
[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software, training and consulting firm. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that the beneficiary met the qualifications of the labor certification or that the petitioner had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

The Beneficiary's Qualifications

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a U.S. academic or professional degree or a foreign equivalent degree above the baccalaureate level.

The regulation at 8 C.F.R. § 204.5(k)(2) permits the following substitution for an advanced degree:

> A United States baccalaureate degree or *a foreign equivalent degree* followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

(Emphasis added.) The petitioner initially claimed that the beneficiary has the equivalent of a baccalaureate degree plus at least five years of progressive experience. The petitioner initially submitted the beneficiary's bachelor degree in business management issued by the University of Mysore, an "Honours Diploma" issued by the National Institute of Information Technology (NIIT) in India and an evaluation of these degrees by [redacted] certified by the American College of Forensic Examiners. The evaluation concluded that the beneficiary's bachelor's degree and diploma from NIIT constituted "the equivalent in level, scope, and intent of a Bachelor's Degree with major fields of study in Computer Science and Business Management at a regionally accredited university in the United States."

On February 3, 2004, the director issued a request for additional evidence, noting that the evidence submitted did not demonstrate that the beneficiary had a degree equivalent to a U.S. baccalaureate degree, as required for the classification sought and by the labor certification.

In response, the petitioner requested that the petition be amended to request classification as a professional or skilled worker pursuant to section 203(b)(3) of the Act. The petitioner also resubmitted the beneficiary's credentials and the evaluation.

Based on this statement, the director concluded that the beneficiary did not have a foreign degree that was equivalent to a U.S. baccalaureate degree, as required by the labor certification. On appeal, counsel asserts that, considering the beneficiary's degree and diploma together, the beneficiary "has completed the equivalent

of a Bachelor's degree with major fields of study in Computer Science and Business Management at a regionally accredited university in the United States." Counsel references a July 23, 2003 memorandum from [redacted] Director of Business and Trade Services for Citizenship and Immigration Services (CIS). In this memorandum, Mr. [redacted] concluded that, in his opinion, a combination of degrees "may be deemed the equivalent of a four-year U.S. bachelor's degree."

The letter from Mr. [redacted] is not binding on the AAO. It does not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the writer's analysis of an issue. The only items considered official CIS policy are statutes, regulations, precedent decisions by the AAO and policy memoranda. *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000)(copy incorporated into the record of proceeding). *See also Matter of Izummi*, 22 I&N Dec. 169, 196 (Comm. 1998).

Regarding Mr. [redacted] evaluation, *Matter of Sea, Inc.*, 19 I&N 817 (Commissioner 1988), provides:

> This Service uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight.

Regardless, we are not contesting Mr. [redacted] conclusion. Mr. [redacted] did not find that the beneficiary has a single degree that is equivalent to a U.S. baccalaureate degree. Rather, he found that the beneficiary's degree and diploma, when taken together, are "the equivalent in level, scope, and intent" to a U.S. baccalaureate degree. As stated above, the beneficiary must have a *degree* that is the equivalent of a U.S. baccalaureate degree. Neither the statute nor the conforming regulations allow for alternatives to the requirement of the specific degree required on the Form ETA-750, whether the equivalency is based on work experience or a combination of lesser educational degrees and certifications. In 1991, when the final rule for the regulation at 8 C.F.R. § 204.5 was published in the Federal Register, the legacy Immigration and Naturalization Service (legacy INS), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

Because the beneficiary does not possess a "United States baccalaureate degree or a foreign equivalent degree" or a "foreign equivalent degree above that of baccalaureate," the beneficiary's subsequent work experience cannot be considered post-baccalaureate experience equivalent to an advanced degree. Thus, the beneficiary is not an advanced degree professional as defined in the regulations.

Moreover, even if we considered the beneficiary's eligibility for classification as a professional or skilled worker pursuant to section 203(b)(2) of the Act, the beneficiary does not have the education required by the labor certification. The Form ETA 750 requires a bachelor degree and four (4) years of education. While a skilled worker need not have a bachelor's degree, in evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The labor certification, Part 14, requires a "B.S. or equiv. degree." No other "Special Requirements" relating to education are specified in Part 15. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. *See* 8 C.F.R. § 204.5(l)(3)(ii)(C). A bachelor degree is generally found to require four (4) years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). As discussed above, the combination of diplomas may not be accepted in lieu of a four-year degree. Thus, whatever classification we were to consider, the beneficiary does not meet the education requirements of the labor certification.

Ability to Pay

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 17, 2003. The proffered wage as stated on the Form ETA 750 is $70,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner after October 2000.

On the petition, the petitioner claimed to have been established in 1996, to have a gross annual income of $200,000, net annual income of $150,000 and to currently employ two workers. In support of the petition, the petitioner submitted evidence of the beneficiary's wages from another employer, Think Development Systems, and the 2001 Schedule C and Form 4562 attachments to the individual income tax return of [redacted] relating to a consulting business at the petitioner's address. The petitioner also submitted the 2001 unaudited financial statements for an unidentified business.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on February 3, 2004, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date in 2003. As the petitioner identifies itself as a limited liability company in its name, the director requested the tax returns of the petitioner, as opposed to those of its proprietor.

In response, the petitioner submitted the 2002 Form 1040 U.S. Individual Income Tax Return for [redacted] including Schedule C. Schedule C lists the petitioner's name, including the "LLC" designation. The return reflects the following information:

Proprietor's adjusted gross income (Form 1040)	$29,175
Petitioner's gross receipts or sales (Schedule C)	$53,953
Petitioner's wages paid (Schedule C)	$12,500
Petitioner's net profit from business (Schedule C)	$6,509

In addition, the petitioner submitted a letter from the [redacted] LLC, asserting that the petitioner has been performing consulting work for South Bass Island Resort since January 2003, and that the consulting fees owed the petitioner upon closing "should be approximately $800,000." The petitioner also submitted a Services Agreement between the petitioner and Think Development Systems dated July 16, 2003. In the agreement, the petitioner agrees to provide consulting services "from time to time by the placement of Work Orders." Think Development Systems incurs no obligation to pay for consulting services "unless and until a Work Order or other written authorization has been executed by both parties." No rate is specified in the agreement; rather, the rate will be determined by the work order. Think Development Systems employed the beneficiary directly in 2001 and 2002, issuing him a Form W-2 for each year listing wages of $23,016 and $41,436.72 respectively. The petitioner submitted a letter from [redacted] at Think Development Systems expressing an interest in continuing to employ the beneficiary as a consultant through the agreement of July 16, 2003. The letter does not specify any wages and does not appear to be a "work order" binding Think Development Systems to employ the beneficiary as a consultant through the petitioner.

The director characterized the agreements as speculative and noted that the 2002 tax return filed by Mr. [redacted] did not reflect sufficient adjusted gross income to cover the proffered wage. Thus, the director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and denied the petition.

On appeal, counsel asserts that the letter from [redacted] guaranteed fees of $800,000 upon completion of the project and, thus, those fees cannot be considered speculative. Counsel continues:

> The petitioner also provided a service agreement between the petitioner and Think Development Systems where the beneficiary was performing consulting and professional services. By performing such services the petitioner was earning and generating income. Such income cannot be considered speculative.

While Mr. [redacted] 2003 tax return may not have been available at the time the director's request for additional evidence was issued, February 3, 2004, the appeal was filed on June 25, 2004. Counsel provides

no explanation for not supplementing the record with that document on appeal despite its obvious relevance to the petitioner's ability to pay the proffered wage during 2003, which includes the priority date.

Where the petitioner has complied with the regulation at 8 C.F.R. § 204.5(g)(2) by submitting the necessary financial or tax documents, CIS will examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it has employed the beneficiary after the priority date.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the petitioner's federal income tax return. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

While the petitioner is organized as a limited liability company, the record reflects that it is being taxed as a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the adjusted gross income listed on Mr. [redacted] 2002 income tax return is less than the proffered wage. Thus, we need not even examine Mr. [redacted] expenses; his income simply cannot demonstrate his ability to pay the proffered wage.

The unaudited financial statements that the petitioner submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. Moreover, as stated above, they do not clearly relate to the petitioner. Finally, the statements relate to 2001, and are not evidence of the petitioner's ability to pay the proffered wage in 2003, when the priority date was established.

We concur with the director that the statement from [redacted] is speculative. The letter does not specify a completion date or provide the period over which it will pay the "approximately $800,000." Thus, it is not clear how much of these funds would be available in 2003 to pay the proffered wage. Moreover, these fees are consideration for consulting work being done. We will not consider income without considering the expenses incurred in earning that income. Any fees earned from [redacted] therefore, must be reduced by the payment of wages to the consultants employed by the petitioner who are consulting for [redacted] and any expenses incurred by the petitioner. The beneficiary has not been working for the petitioner or Flex Tech. Thus, the petitioner has not established that the fees from [redacted] will cover the proffered wage after deducting the wages of the petitioner's employees consulting for Flex Tech.

The agreement between the petitioner and [redacted] is similarly unpersuasive. As noted above, the agreement does not bind [redacted] to pay consulting fees meeting or exceeding the proffered wage, well above what [redacted] has been paying the beneficiary directly according to the 2002 Form W-2 it issued to him. Thus, the petitioner has not established that its income from [redacted] will be sufficient to cover the salary of the beneficiary and all concomitant expenses of the petitioner's business. Further, as also noted above, until a "work order" is completed [redacted] is not bound to use the beneficiary's services through the petitioner. As the agreement does not guarantee either placement with [redacted] or net revenue for the petitioner, the claim of this future income is indeed speculative.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2003 or subsequently. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.